IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.109 OF 2006

Shri Anupkumar Rupkishor Gupta ..Petitioner.

V/s.

Shri Rohington Faradoon Deolaliwala ..Respondent.

Ms.P.P.Tendulkar i/b. M.S.Karnik for petitioner.

Mr.Yatin R.Shah for respondent.

CORAM : R.M.SAVANT, J.

DATED : 6TH JUNE, 2007.

P.C. :-

Rule. By consent of the parties, returnable forthwith. Heard counsel for the parties.

2. This petition is filed under Article 227 of the Constitution of India, challenging the order dated 21/11/2005 passed below Exhibit 71. By this order, the application of the petitioner for setting aside the no W.S. order and for taking the W.S. on record has been rejected.

3. The petitioner is the original plaintiff in Regular Civil Suit No.150/2002 filed for declaration and permanent injunction. In the said suit, a counter claim is filed by the respondent herein, who is

defendant in the said suit.

4. The said suit was kept on board of Civil Judge, J.D.Nashik on 21/9/2005 for enabling the petitioner to file his say to the counter claim which was numbered as Exhibit 65. Since the petitioner's Advocate was not available, the say could not be filed. The Court, therefore, was pleased to pass "No say order" in respect of the said counter claim so far as the petitioner is concerned. The petitioner thereafter moved an application at Exhibit 71 for setting aside the no say order and for taking the W.S. / say on record and the said application came to be rejected by the impugned order.

5. I have heard learned counsel for the parties. The learned counsel for the petitioner submits that on account of the fact that the Advocate was not available on 21/9/2005 the say could not be filed. The learned counsel for the petitioner submitted that the petitioner cannot be penalised for the absence of his advocate on that day. There has been no negligence or delay on the part of the petitioner.

6. On behalf of the respondent, it is contended

that the petitioner has given no reasons why the petitioner was not in a position to file say.

7. In my view, considering the application, the petitioner has made out a case for setting aside the impugned order dated 21/11/2005. It is well settled that the provisions of order 8 Rule (1) of Code of Civil Procedure have been held to be directory and not mandatory and the period for filing Written Statement can be extended if case is made out for the same. In that view of the matter, the petition will have to be allowed and the impugned order will have to be set aside.

8. However, interest of justice would require that the petitioner should pay costs of Rs.3,000/- within two weeks from today, to the respondent No.1 as a condition precedent for taking the W.S./say on record.

9. If the cost is not paid as directed above, the petition would stand dismissed.

10. Both the learned counsel for the parties agreed to co-operate in the early disposal of the said suit.

(R.M.SAVANT, J.)